In the

SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 184

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*

VS.

HORSESHOE LEASE SYNDICATE, *Respondent.*

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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INDEX TO SUBJECT MATTER

Page

Introduction 1

Opinion Below 2

Jurisdiction 2

Question Presented 2

Statutes and Regulations Involved 3

Statement 3

Summary of Argument 5

I. The decision is correct.

II. The decision below does not conflict with any decision in any other circuit and it does not conflict with any decision of this Court.

III. The question presented requires the application of principles, fixed by decisions, to the peculiar facts in each case which is under consideration.

Argument 5

Point I 5

Point II 19

Point III 25

Conclusion 35

INDEX TO AUTHORITIES CITED

Page

Baldwin's Century Ed. of Bouvier's Law Dictionary 15

Bert v. Helvering, 92 F. (2d) 491 (App. D. C.) 24, 29

Burk-Waggoner Oil Association v. Hopkins, 269 U. S. 110, affirming District Court 296 F. 492 .....23, 24

Commissioner v. Fleming, 82 F. (2d) 324, (C. C. A. 5th) 14, 19

Commissioner v. Highlands E. L. Subd., etc. 88 F. (2d) 355 (C. C. A. 7th), certiorari denied 302 U. S. 691 .....26, 31

Commissioner v. N. B. Whitcomb Coca-Cola Syndicate, 95 F. (2d) 596, (C. C. A. 5th) aff'g 35 B. T. A. 1031 .....15, 23, 29

Commissioner v. Vandegrift Realty Co., 82 F. (2d) 387 (C. C. A. 9th) 25, 30

Crabb v. Bell (Tex. Civ. App.) 220 S. W. 623 .....14, 19

Everts, C. A., et al. v. Commissioner, 38 B. T. A. 1039 21

Hecht v. Malley et al., former Collector of Internal Revenue, 44 S. Ct. 462, 265 U. S. 144 5

Helvering v. Coleman-Gilbert Associates, 296, U. S. 369, 56 S. Ct. 285 ..... 8, 12

Page

Helvering v. Combs, 296 U. S. 365, 56 S. Ct. 287....8, 26, 31

Lewis, A. A. & Company et al. v. Comm., 57 S. Ct. 799, 301 U. S. 385 ....16, 19, 28

McEntire v. Thomasson (Tex. Civ. App.) 210 S. W. 563 ....14, 19

Monrovia Oil Co. v. Commissioner, 83 F. (2d) 417, (C. C. A. 9th) 24

Morrissey v. Commissioner, 56 S. Ct. 289, 296 U. S. 344 ....6, 8, 16, 26, 28, 31, 35

Swanson v. Commissioner, 56 S. Ct. 283, 296 U. S. 362 8

Thrash Lease Trust v. Commissioner, 36 B. T. A. 444, 99 F. (2d) 925 (C. C. A. 9th), certiorari denied, 306 U. S. 654 ....20, 21, 22

Title Insurance & Trust Co. v. Commissioner, 100 F. (2d) 482 (C. C. A. 9th) 24

United States v. Trust No. B. I. 35, 107 F. (2d) 22 (C. C. A. 9th) 26, 31

Wellston Hill Syndicate Fund v. Commissioner, 101 F. (2d) 924 (C. C. A. 8th) 24

Wholesalers Adjustment Co. v. Commissioner, 88 F. (2d) 156 (C. C. A. 8th) 24

STATUTES AND REGULATIONS INVOLVED

Page

Judicial Code:

Sec. 240 (a) 2

Revenue Act of 1932:

Sec. 13 36
Sec. 52 36
Sec. 181 37
Sec. 182 37
Sec 189 37
Sec. 1111 ..... 2, 36

Revised Civil Statutes of Texas:

Art. 5924 40

Treasury Regulations 77:

Art. 1311 38
Art. 1312 38
Art. 1313 38
Art. 1314 39
Art. 1320 39

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

On June 26, 1940, petition was filed on behalf of petitioner, praying that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above entitled cause on March 26, 1940.

The respondent opposes the petition for writ of certiorari for the reasons hereinafter set out.

OPINIONS BELOW

The unpublished Memorandum Opinion of the United States Board of Tax Appeals is printed in the record at pages 13 to 24, inclusive.

The decision of the United States Board of Tax Appeals is printed in the record at page 25.

The Opinion of the United States Circuit Court of Appeals is reported in 110 F. (2d) 748.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 26, 1940, and the jurisdiction of this Court has been invoked under *Section 240 (a) of the Judicial Code* as amended by the *Act of February 13, 1925.*

Notice of filing the petition herein, together with notice that no brief in support will be filed, copies of petition and transcript of record were served on counsel for respondent on July 12, 1940.

QUESTION PRESENTED

The question presented is as follows:

For the calendar year 1932, was respondent an associate within the meaning of Section 1111 (a) (2) of

the Revenue Act of 1932 and as such subject to income tax as a corporation?

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and regulations involved are set forth in the Appendix, *infra*, pages 36-40.

Articles 801-1 to 801-5 of Regulations 86 promulgated under the Revenue Act of 1934 set forth on pages 22 to 27 of the petition have no application here.

STATEMENT

The statement set out on pages 2 to 13, inclusive, of the petition herein is substantially correct.

The Court below has correctly and succinctly set out the important facts.

In 1931, the several owners of a tract of land in Texas executed a mineral lease thereon to J. Edgar Finley, P. T. Fullwood and the Patterson Drilling Company, a corporation, pursuant to an agreement between said parties, under the terms of which the lessees were required to organize a syndicate having 350 units of a par value of $100 each, to sell the units, and, from the proceeds, to drill an oil well on the property. The consideration to the lessors was a 1/8 royalty, a yearly rental of $1 per acre, and 35 units.

Finley, Fullwood, and the Patterson Drilling Company assumed the name Horseshoe Lease Syndicate, di-

vided their joint interest in the lease into 350 fractional parts, and sold as many of said parts as they desired, delivering to the purchasers an assignment of one or more fractional parts in accordance with their purchase. Under the provisions of the assignment, the assignors contracted to drill a well with their equipment, and to operate, market, manage, and account for all proceeds thereof. Each purchaser executed in favor of the assignors a power of attorney, empowering them to act for and in behalf of all co-owners in all matters relating to the property of the syndicate, thereby vesting the management and control in the three attorneys in fact. No provision was made for the perpetuation of the management so created, or for the succession or substitution of attorneys in fact. The fractional parts purchased by assignment were readily transferable by reassignment, and many such transfers were made. The well contracted to be drilled by the assignors was to be paid for by them, and any additional wells drilled were to be paid for out of the proceeds of the wells then producing. Excepting this stipulation, there was no other limitation of liability in favor of the assignees. The net earnings of the enterprise periodically were to be computed and divided among the co-owners as their interests appeared; no surplus was to be created, and no salaries were to be paid.

Organized and operating in this manner, the first well was drilled successfully, and, sometime later, another producing well was drilled from the proceeds of the first. The net income derived therefrom was paid

to the co-owners in accordance with the agreement, and was reported by them in their individual income tax returns. The syndicate filed a partnership return for the year 1932, and the Commissioner claimed that a corporation return should have been filed, thereby creating the issue here. (R. 168-169)

SUMMARY OF ARGUMENT

I.

The decision below is correct.

II.

The decision below does not conflict with any decision in any other circuit and it does not conflict with any decision of this Court.

III.

The question presented requires the application of principles, fixed by decisions, to the peculiar facts in each case which is under consideration.

ARGUMENT

I.

The decision below is correct.

In the case of *Hecht v. Malley et al., former Collector of Internal Revenue* and associated cases, *44 S. Ct. 462, 265 U. S. 144,* this Court said among other things:

"The word 'association' appears to be used in the Act in its ordinary meaning. It has been defined as a term 'used throughout the United States to signify *a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise.*'" (Italics supplied)

In the more recent case of *Morrissey v. Commissioner, 56 S. Ct., 289, 296 U. S. 344*, decided under the Revenue Acts of 1924 and 1926, this Court said in part as follows:

"'Association' implies associates. It implies the entering into a joint enterprise, and, as the applicable regulation imports, an enterprise for the transaction of business. This is not the characteristic of an ordinary trust — whether created by will, deed or declaration — by which particular property is conveyed to a trustee or is to be held by the settlor, on specified trusts, for the benefit of named or described persons. Such beneficiaries do not ordinarily, and as mere cestuis que trust, plan a common effort or enter into a combination for the conduct of a business enterprise * * *. As we have seen the classificiation cannot be said to require organization under the statute, or with statutory privileges. The term embraces associations as they may exist at common law. *Hecht v. Malley, supra.* We have already referred to the definitions, quoted in that case, showing the ordinary meaning of the term as applicable to a body of persons united without a charter 'but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise.' * * *

"What, then, are the salient features of a trust —when created and maintained as a medium for the carrying on of a business enterprise and sharing its gains—which may be regarded as making it analogous to a corporate organization? *A corporation, as an entity, holds the title to the property embarked in the corporate undertaking. Trustees, as a continuing body with provision for succession, may afford a corresponding advantage during the existence of the trust.* Corporate organization furnishes the opportunity for a centralized management through representatives of the members of the corporation. The designation of trustees, who are charged with the conduct of an enterprise, who act *'in much the same manner as directors', may provide a similar scheme, with corresponding effectiveness.* Whether the trustees are named in the trust instrument with power to select successors, so as to constitute a self-perpetuating body, or are selected by, or with the advice, of those beneficially interested in the undertaking, centralization of management analogous to that of corporate activities may be achieved. An enterprise carried on by means of a trust may be secure from termination or interruption by the death of owners of beneficial interests and in this respect their interests are distinguished from those of partners and are akin to the interests of members of a corporation. And the trust type of organization facilitates, as does corporate organization, the transfer of beneficial interests without affecting the continuity of the enterprise, and also the introduction of large numbers of participants. The trust method also permits the limitation of the personal liability of participants to the property embarked in the undertaking.

"It is no answer to say that these advantages flow from the very nature of trusts. For the question has arisen because of the use and adaption of the trust mechanism. The suggestion ignores the postulate that we are considering those trusts which have the distinctive feature of being created to enable the participants to carry on a business and divide the gains which accrue from their common undertaking, trusts that thus satisfy the primary conception of association and have the attributes to which we have referred, distinguishing them from partenerships. *In such a case, we think that these attributes make the trust sufficiently analogous to corporate organization to justify the conclusion that Congress intended that the income of the enterprise should be taxed in the same manner as that of corporations.*" (Italics supplied)

On the same day that the Morrissey case was decided this Court decided the following cases involving the same question with which we are here concerned:

Swanson v. Commissioner, 56, S. Ct. 283, 296 U. S. 362;

Helvering v. Combs, 296 U. S. 365, 56 S. Ct. 287;

Helvering v. Coleman-Gilbert Associates, 296 U. S. 369, 56 S. Ct. 285.

The important facts in connection with this question in the four cases cited, supra, are summarized below.

In the *Morrissey* case, supra, the petitioner, in 1921, made a declaration of trust of real estate in Los Angeles, designating the enterprise as Western Avenue Golf Club.

(1) The trustees were authorized to add to their number and choose successors, to purchase, encumber, sell, lease and operate the described or other lands and to construct and operate golf courses, etc.

(2) The trustees were authorized to receive rents, profits and income and to make loans and investments.

(3) The trustees were authorized to make regulations and to generally manage the trust estate as if the trustees were its absolute owners.

(4) The trustees were declared to be without power to bind the beneficiaries personally, those dealing having only the right to look to the property for satisfaction.

(5) The beneficial interests were evidenced *solely by transferable certificates* for shares, 2000 preferred, $100 par, and 2000 common, no par.

(6) Trustees were empowered to call meetings of shareholders, but votes of the shareholders were to be advisory only.

(7) *It was provided that the death of a trustee was not to end the trust*, which was to continue for 25 years unless terminated sooner by the trustees.

(8) Beneficial interests were sold, but *title to the real estate remained in the trustees.*

In the *Swanson* case, supra, the following important facts existed:

(1) One Swanson and one Otis acquired vacant land with the view of improving it by erecting an apartment house and a trust agreement was formed for the purpose of carrying *title* to the property, the first trustees being Otis, Swanson and Mills. The trust was designated "Lake View Land Association."

(2) The trustees were given complete management and control of the property, power to exchange, reconstruct, remodel, sell or improve the property; to borrow money secured by the property; to rent suitable quarters to transact the trust business and employ assistants; to issue receipts evidencing interests of beneficiaries, representing *1000 shares of the par value* of $100 each.

(3) It was provided that the receipts were evidences of ownership of *personal property* and not real estate.

(4) It was provided that the certificates could be *transferred by assignment.*

(5) The agreement provided that the *trust could sue and be sued.*

(6) It was provided that the *trustees were not personally liable* and that persons dealing would look only to the property.

(7) It was provided that the trust should terminate at the end of 20 years after the death of the last survivor of certain persons, or by disposing of all the property.

(8) *It was provided that the trust had succession and was not terminated by death.*

(9) It was provided that the compensation of the trustees was to be fixed by themselves but not to exceed 2½% of the gross income.

(10) It was provided that after making provision for the payment of outstanding claims, the net income was to be divided among the beneficiaries according to their interests.

In the *Combs case*, supra, the following important facts existed:

(1) A trust was created to finance and drill a well for the production and sale of oil. Under a trust agreement, the Hub Oil Company, owner of the lease, assigned it to E. E. Combs and Edward Everett as trustees.

(2) The agreement described as beneficiaries all persons who may own or acquire a portion of the whole beneficial interest as defined, the whole beneficial interest being defined as 71 plus per cent of gross production, and the beneficiaries were to be paid their pro rata share after the deduction for payment of trust obligations, i. e., 25% to beneficiaries who provided the money and 44 plus per cent to E. E. Combs and 2% to Edward Everett.

(3) The trust provided for the certificates of beneficial interests to be issued in approved legal form.

(4) Thirteen persons were named as beneficiaries with amounts contributed and the percentages owned by each, these amounts aggregating $25,000.

(5) *The certificate of beneficial interest recited that the party named was the holder of the beneficial interest transferable upon the books of the trustee upon endorsement and surrender of the certificates.*

(6) *The trustees were authorized to hold title to all property and property rights, the legal title to which might vest in them under the trust, to use the moneys deposited by the beneficiaries, to pay labor, to pay debts, to borrow money upon credit of the trust and to sell any unsold beneficial interests etc.*

(7) *The trustees were not to be individually liable except for willful misconduct.*

(8) *All proceeds of sale were to be placed in a designated bank.*

In the *Coleman-Gilbert Associates* case, supra, the following important facts existed:

(1) Five individuals, being the co-owners of twenty apartment houses in Boston, formed by indenture the Coleman-Gilbert Associates.

(2) By the trust instrument, which recited a contemporaneous conveyance of the property to themselves, they declared that the real estate so conveyed and any real estate thereafter acquired under the trust should be held by them *in trust* for the purposes described with the designation "Coleman-Gilbert Associates."

(3) The trust was to continue for 15 years unless sooner terminated by sale or disposition of the estate.

(4) The trustees were to hold title to the property in order to improve and dispose of it for the benefit of persons named as "cestuis que trustent and beneficiaries, and their respective representatives and assigns, devisees, or legatees" in the shares provided in the instrument.

(5) It was provided that the beneficiaries were to have no interest in the trust property and especially were they to have no right to call for any partition thereof.

(6) *It was provided that the interests of the beneficiaries were to be personal property.*

(7) *It was provided that the death of any one or of all the beneficiaries was not to determine the trust nor entitle the legal representatives of the decedent to an accounting by the trustees.*

(8) It was provided that the trustees had full power and discretion as absolute owners, being authorized to invest and reinvest the trust property, including income, in mortgages and and other obligations secured upon real estate and in the purchase and improvement of real estate situated in the cities and towns of the commonwealth of Massachusetts.

(9) The trustees were authorized to sell at public or private sale all or any part of the property; to hire

for improvement or otherwise, lease, exchange, release, borrow money and to make contracts.

(10) It was provided that funds in possession of the trustees not required in the judgment of the trustees for development and improvements were to be divided and paid over annually or oftener, *if convenient*, to the beneficiaries.

(11) *It was provided that the trustees were to have no power to bind the beneficiaries personally.*

(12) *Provision was made for resignation of the trustees and for the apponitment by the surviving trustees of successors but if the surviving trustees failed to do this, the beneficiaries had the right of selecting successor trustees.*

(a) In the case under consideration the owners of undivided fractional intrests in the lease were not associated or united upon the methods or forms used by incorporated bodies for the prosecution of a common enterprise.

(b) The undivided fractional interests in the oil and gas lease which the lessees owned were interests in real estate which the owners held as tentants in common under the laws of Texas.[1]

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1. Comm. v. Fleming, 82 F. (2d) 324, (C. C. A. 5th); Crabb v. Bell (Tex. Civ. App.) 220 S. W. 623; McEntire v. Thomasson (Tex. Civ. App.) 210 S. W. 563.

(c) Shares of stock in a corporation are now universally considered to be personal property.[1]

(d) Each purchaser of an undivided fractional interest in the lease gave to the sellers a written power of attorney and, therefore, each joint owner in legal effect was active in connection with the operation of the lease. *Qui facit per alium, facit per se.* It is clear that activities under written and separate power of attorney from each owner of an interest in a lease is not similar to Corporate activities.[2]

(e) There was no limited liability except the provision in the contract with the fee owners who gave the lease that the 35/350 given to them as part consideration for the lease would not be assessed for drilling or operating costs.

(f) There was no trust agreement of any kind and the co-owners or joint tenants derived no benefits enjoyed by associates, stockholders or beneficiaries of a trust through the manner and method in which their property was operated.

(g) No trustee or trustees and no entity of any kind held title, equitable or legal, to any interest in the lease for the benefit of any other person. Each owned his in-

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1. Baldwin's Century Edition of Bouvier's Law Dictionary.

2. Comm. v. N. B. Whitcomb Coca-Cola Syndicate, 95 F. (2d) 596 (C. C. A. 5th) affg 35 B. T. A. 1031.

terest in the lease, in real property under the laws of Texas, and there was no entity of any kind separate and distinct from the co-owners. In *Morrissey v. Commissioner*, supra, this Court said among other things:

> "A corporation as an entity holds the title to the property embarked in the corporate undertaking. Trustees, as a continuing body, with provision for succession may afford a corresponding advantage during the existence of the trust."

(h) The consideration paid by each purchaser of interest in the lease was paid to and belonged to the sellers. It was not the property of any entity. It cannot be compared with capital of a corporation.

(i) No provision was made for succession.

(j) No provision was made that the interests which the co-owners had in the lease should be personal property.

(k) No provision was made for majority control.

(l) No corporate formalities were ever observed.

The characteristics of the syndicate are not in any degree analogous to the characteristics of an ordinary corporation.

It is insisted that the facts in the four Supreme Court cases relied on by petitioner are not at all similar to the facts in the case under consideration and that the facts in this case are more analogous to the facts in the case of *A. A. Lewis & Company et al. v. Commissioner, 57 S. Ct. 799, 301 U. S. 385*, decided by this Court in

which it was held that there was no association and no corporation income tax liability. In this case it was said among other things:

> "If it were not for the declaration of trust, we should have here the simple case of an appointment by a land owner of an agent to subdivide the land and sell it, receiving as compensation for his services a fixed percentage of the payments made by the purchasers. *It is quite evident that such an arrangement has no element of substance or method which would warrant its designation as an association under the statutory provision in question.* (Revenue Act of 1928) *Nor can we see that the intervention of a trustee to hold title, execute contracts and conveyances at the direction of the real-estate agent and make collections alters the situation.*
>
> "The question recently has received full consideration in Morrissey v. Commissioner, 296 U. S. 344, and three other cases which immediately follow in the same volume. The trust reviewed in the Morrissey case was essentially unlike that now under consideration. There the trust was a medium for the carrying on of a business enterprise by the trustees and participation in the profits by numerous *beneficiaries whose interests were represented by transferable share certificates, thus permitting the introduction of new participants without affecting the continuity of the plan. The certificates represented both perferred and common shares.* We pointed out that the corporate analogy was evidenced by centralized control, continuity and limited liability, as well as by the issue of transferable certificates; and we said (page 356) that the word 'association' implies associates. 'It implies the entering into a joint enterprise, and, as the applicable

(departmental) regulation imports, an enterprise for the transaction of business. This is not the characteristic of an ordinary trust—whether created by will, deed, or declaration—by which particular property is conveyed to a trustee or is to be held by the settlor, on specified trusts, for the benefit of named or described persons. Such beneficiaries do not ordinarily, and as mere cestuis que trustent, plan a common effort or enter into a combination for the conduct of a business enterprise.'

"The arrangement here answers the foregoing description of an ordinary trust—that is, it was created in virtue of a declaration by which a designated piece of real property was conveyed to the trustee on specified trusts, for the benefit of definitely named persons, one of whom was the grantor of the land and the other an agent of the grantor for the sole purpose of subdividing and selling the land. The agent was designated by name, and his powers definitely fixed in advance of their exercise. *He possessed no authority beyond that expressly delegated by his principal.* The trust was adopted merely as a convenient means of making effective the sales of the agent under the contract. The duties of the trustee were purely ministerial, with no power to control, direct, or participate in, the conduct of the selling enterprise contemplated by the contract. There is to be found in the operation of the business no essential characteristic of corporate control—nothing analogous to a board of directors or shareholders, no exemption from personal liability, no issue of transferable certificates of interest. *There is simply the common relation of principal and agent, coupled with the collateral incidents of an ordinary trust. We are not able to find in the situation an 'association' within the meaning of*

the statute under consideration, because there are no associates and no feature 'making (the trust) analogous to a corporate organization.'" (Italics supplied)

Here, as in the *Lewis* case, we have the relationship of principal and agent, Finley, Fullwood and Patterson Drilling Company being the agents and each purchaser of undivided fractional interest in the lease being principal. There was no organization because each owner of an interest in the lease was acting in connection with the drilling and operation of the lease through the agents authorized in power of attorney (R. 168). *Qui facit per alium facit per se. The legal title to the property was not separated from the beneficial ownership. There was no entity of any kind and no trustee holding title for anyone else.* Each owned his own interest in the property which was an interest in real estate under the laws of Texas.[1]

It is urged that clearly the decision that Horseshoe Lease Syndicate was not an association is correct.

II.

The decision below does not conflict with any decision in any other circuit and it does not conflict with any decision of this Court.

On page 14 of the petition herein among other things the following statement is made:

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1. Commissioner v. Fleming, 82 F. (2d) 324, (C. C. A. 5th); Crabb v. Bell, 220 S. W. 623 (Texas); McEntire v. Thomasson, 210 S. W. 563.

"The decision below is in substantial conflict with *Thrash Lease Trust v. Commissioner*, 99 F. (2d) 925 (C. C. A. 9th), certiorari denied, 306 U. S. 654. There an arrangement similar to the arrangement in the instant case was entered into for the development and exploitation of an oil and gas lease in Texas. The lease was assigned to one Gordon MacMillan, as trustee, and the development of the property and assignment of the interests were carried out in much the same manner as those details were carried out in the instant case. Percentage interests were assigned to many persons, some of the interests purporting to be interests in the oil and gas and some purporting to be interests in the lease."

In the *Thrash Lease Trust* case (36 B. T. A. 444)[1] it was held by the United States Board of Tax Appeals that

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1. In the *Thrash Lease Trust case*, the Board of Tax Appeals among other things said:

"Although, from the evidence, the organization is amorphous indeed, there is little doubt that there was an organization of individuals holding transferable shares in a common business enterprise managed by one or two of their number, who distributed the profits proportionately with interest. This is enough to give prima facie substance to the Commissioner's treatment of it as an association, Morrissey v. Commissioner, 296 U. S. 344; Helvering v. Combs 296 U. S. 365; Helvering v. Coleman-Gilbert Associates, 296 U. S. 369; Swanson v. Commissioner, 296 U. S. 362; Bert v. Helvering, 92 Fed. (2d) 491, and to require an affirmative showing by the petitioner of attributes and circumstances indicating a different taxable character under the revenue statute. No such showing is in this record, and the determination must stand."

the Thrash Lease Trust was an association. The Board of Tax Appeals in the *Thrash Lease Trust* case held that the facts were not sufficient to overcome the showing made in favor of the Commissioner's determination.[1]

In addition to the fact that in the *Thrash Lease Trust* case the Board of Tax Appeals based its opinion in part on the fact that the Thrash Lease Trust had not overcome the burden placed on it, the United States Circuit Court of Appeals for the Ninth Circuit in affirming the Board of Tax Appeals commented significantly on the

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1. In the case of *C. A. Everets et al. v. Commissioner of Internal Revenue, 38 B. T. A. 1039*, the Board of Tax Appeals commented on the decision in the *Thrash Lease Trust* case as follows:

   "In Thrash Lease Trust, 36 B. T. A. 444, cited by respondent, we did not think that the facts were sufficient to overcome the showing made in favor of the correctness of the Commissioner's determination and in that respect is distinguished from the instant case."

fact that title to the property was in part in a trustee.[1] This is one of the most important considerations.

It is thus seen that in the *Thrash Lease Trust* case emphasis was placed by the Circuit Court upon the fact that a trustee held title for the benefit of others; that there was a trust, an entity which was operated like a corporation, and that there was sufficient analogy to a corporate organization to justify the action of the Commissioner in determining that the income involved should be taxed in the same manner as that of a corporation. The *Thrash Lease Trust* case, therefore, is quite different on its facts from the case under consideration.

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1. In the case of *Thrash Lease Trust v. Commissioner, 99 F. (2d) 925, Certiorari denied, 306 U. S. 654*, the Ninth Circuit said among other things as follows:

   "This was not any ordinary trust. *The title to the property, as far as the percentage shareholders were concerned, was in a single person denominated trustee. The respective interests of the several percentage holders were subject to transfer*; the management, so far as appears, was centered in the MacMillans, who conducted the business much after the manner of directors of a corporation.

   "This is a border line case. *The entity* here, the Thrash Lease Trust, petitioner, in its general structure and method of operation, is sufficiently *analogous to a corporate organization to justify the action of the Commissioner in determining that the income of the enterprise should be taxed in the same manner as that of a corporation.*" (Italics supplied)

Here, we have no entity separate and apart from the individual owners. Each owns an interest in real estate and each person owning an interest acted either personally or through his agents and attorneys in fact, similar in substantial respects to the case of *Commissioner v. N. B. Whitcomb Coca-Cola Syndicate, 95 F. (2d) 596, affirming 35 B. T. A. 1031.*[1]

It is contended in the petition that the decision below conflicts also with the case of *Burk-Waggoner Oil Association v. Hopkins, 269 U. S. 110, affirming District Court 296 Fed. 492.* The facts in the Burk-Waggoner Oil Association case have no reasonable resemblence to the facts in this case. And there is no conflict between

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1. In the Whitcomb Coca-Cola case, the Fifth Circuit said among other things as follows:

> "There was no trust in a technical sense, for the manager was not to hold title to any property for the use of others. Each share bought was to be participated in by each subscriber in proportion to his interest in the Syndicate. Each share was thus owned by the subscribers in common. The manager was not the agent of an aggregation of subscribers, that is to say, of an entity, but the authority was expressly to buy and sell the stock 'for the account of each subscriber.'"

the decision in the instant case and the decision of this Court in the Burk-Waggoner Oil Association case.[1]

In the petition, (p. 17), it is insisted that the decision below is in conflict with the following cases to the extent that it fails to apply the principles established by the Supreme Court decisions:

Monrovia Oil Co. v. Commissioner, 83 F. (2d) 417 (C. C. A. 9th);

Wholesalers Adjustment Co. v. Commissioner, 88 F. (2d) 156, (C. C. A. 8th);

Bert v. Helvering, 92 F. (2d) 491 (App. D. C.);

Title Insurance & Trust Co. v. Commissioner, 100 F. (2d) 482 (C. C. A. 9th);

Wellston Hills Syndicate Fund v. Commissioner, 101 F. (2d) 924, (C. C. A. 8th).

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1. In the *Burk-Waggoner Oil Association* case, this Court held that that Association was liable to tax as a corporation. There was a joint stock association in that case operating under a trust agreement. It was to continue for twenty-one years after the death of the last of six trustees. The purpose of the joint stock association was to purchase or lease oil lands and to develop and operate them. There was capital stock of $60,000 divided into 600 shares of par value of $100 each. Provision was made for transfer of certificates and corporate formalities were observed except that no corporate charter was filed.

In each of these cases it is clear that, unlike the facts in this case, the legal title to the assets was separated from the beneficial ownership and that many formalities of a corporation were observed.

In view of the above, it is insisted that the decision herein is not in conflict with any decision of any circuit or with any decision of this Court.

III.

The question presented requires the application of principles, fixed by decisions, to the peculiar facts in each case which is under consideration.

In the petition (p. 17) under "Reasons for Granting the Writ," the following statement is made:

> "Whether the Horseshoe Lease Syndicate is an association within the statutory definition was treated by the court below as a question of fact, and it limited its review simply to an examination of whether there was 'substantial evidence to support' what it described as 'the finding' of the Board of Tax Appeals. In so limiting the scope of review, the decision below is in direct conflict with a number of decisions which treat the question as one of law, and in each one of which the judgment of the lower tribunal was reversed."

The following cases are then cited:

Commissioner v. Vandegrift Realty Co., 82 F. (2d) 387 (C. C. A. 9th);

Commissioner v. Highlands E. L. Subd., etc., 88 F. (2d) 355 (C. C. A. 7th), *certiorari denied*, 302 U. S. 691;

United States v. Trust No. B. I. 35, 107 F. (2d) 22 (C. C. A. 9th);

Helvering v. Combs, 296 U. S. 365.

It is insisted that the decision below follows the principles laid down in the case of *Morrissey v. Commissioner*, supra, and other cases decided by this Court. In each of the above cited cases the legal title to the property involved was separated from the beneficial ownership; there was an origanization engaged in business and corporate formalities were observed.

In the decision below herein the Court in following the case of *Morrissey v. Commissioner*, supra, said in part as follows:

> "It has been said that no inelastic rule can be advanced to settle the question, due to the variety of circumstances under which it may arise, but that the facts of each case must control its determination." Citing *Morrissey v. Commissioner.*

The language of the Court below to which exception is taken in this connection is perhaps in the following sentences:

> "The determination of this issue depends upon whether the syndicate, so organized and operated,

resembles a corporation more nearly than it does a partenership, not being either exactly. Commissioner v. Brouillard, 70 F. (2) 154; Bert v. Helvering, 92 F. (2) 491. This is a question of fact, and the Board of Tax Appeals, under the stipulated facts, found that, for purposes of the income tax laws, the syndicate more nearly resembled a partnership. This finding must be upheld by this court if there is substantial evidence to support it, even though conflicting inferences fairly might be drawn by reasonable men from the undisputed facts. South Chicago Coal & Dock Co. v. Bassett, — U. S. — (Feb. 26, 1940) . . . From the undisputed facts above stated, a reasonable inference of fact may fairly be drawn that respondent was not an association within the meaning of the statute. Therefore, there is substantial evidence to support the finding of the board to this effect, and its conclusion of law that respondent was not subject to income tax as a corporation was correct." (R. 169)

It is thus seen that the lower Court held that the determination of this issue (the association issue) depended upon whether the syndicate resembled a corporation more nearly than it did a partnership and that this (the question of resemblance or analogy) was a question of fact. It is clear that the lower Court in so ruling herein was following the principles fixed by this Court in the four leading cases cited above.

In the *Morrissey* case, supra, this Court said among other thing:

> "In such a case, we think that those attributes make the trust sufficiently analogous to corporate

> organization to justify the conclusion that Congress intended that the income of the enterprise should be taxed in the same manner as that of corporations."

Again, this Court said in the case of *A. A. Lewis & Company et al. v. Commissioner*, supra:

> "We pointed out that the corporate analogy was evidenced by centralized control, continuity and limited liability, as well as by the issue of transferable certificates; and we said that the word 'association' implies associates."

It is insisted that it is clear that this Court in these two cases and other cases has laid down the rule that in deciding this question it is necessary that the attributes (or characteristics) of the alleged association be compared with those of corporate organization to determine their analogy (or resemblance) to a corporate organization. It is clearly necessary that the facts in each particular case be carefully considered and that facts in each case shall govern in the decision on this question and that is the way the United States Court of Appeals for the District of Columbia in the

case of *Bert v. Helvering*, 92 F. (2d) 491,[1] and the United States Circuit Court of Appeals for the Fifth Circuit in the case of *N. B. Whitcomb Coca-Cola Syndicate*, 95 F. (2d) 596, *affirming* 35 B. T. A. 1031,[2] have each so construed the principles laid down by this Court.

The Court below has considered the peculiar facts in the case as have other courts which have followed the principles laid down by decisions of this Court and it is clear that, in any and all cases involving this question, it is absolutely necessary that each case be given

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1. In the *Bert* case, the United States Court of Appeals for the District of Columbia said in part as follows:

   "And, as we have seen, the Supreme Court has expressly abolished the control test as a factor in applying the provision of the income tax law applicable here, but instead has substituted as a more accurate test the question whether the method adopted for carrying on the enterprise most resembles that of an incorporated body."

2. In the opinion of the Board of Tax Appeals in the *Whitcomb Coca-Cola* case, the Board made the following statement in this connection:

   "But each must be decided upon its own facts. See particularly Morrissey v. Commissioner, 296 U. S. 344. The characteristics of alleged association must be compared with the characteristics typical of a corporation. If there is sufficient resemblance, then the taxpayer is held to be an association taxable as a corporation; but if there is little similarity, then the decision must be the other way."

consideration on its own peculiar facts. Here the decision below has held that the Board of Tax Appeals was correct in "its conclusion of law that respondent was not subject to income tax as a corporation." The decision below holds that the determination of the association issue depends upon whether the syndicate *resembles* a corporation more nearly than it does a partnership and that *this (resemblance) is a question of fact.* It is insisted that this conclusion is correct and not in conflict with any decision of this Court or with any decision of any other circuit.

The scope of review of the lower Court herein has not been so limited as to be in conflict with any other decision.

In this connection the case of *Commissioner v. Vandegrift Realty* Co., 82 F. (2d) 387 (C. C. A. 9th)[1] is cited in the petition. In the Vandegrift case as here, the peculiar facts were considered and the law applied.

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1. In the *Vandegrift* case the facts have no reasonable resemblance or analogy to the facts herein and among other things the Court said:

"We recognize that the question as to whether or not the trust engaged in business during a specified period is one of fact but we hold that it is a question of law as to the activity required in order that a trust be classified for tax purposes, either as an association or a simple, inactive, or pure trust, and we hold that it is a question of law, with respect to the measure or standard by which we may determine whether or not a trust shall be taxed as a corporation, by reason of its classificiation as an association."

In this connection the case of *Commissioner v Highlands E.-L. Subd., etc.*, 88 F. (2d) 355 (C. C. A. 7th)[1] certiorari denied, 302 U. S. 691, is cited in the petition. In the *Highlands* case as here the peculiar facts were considered and the law applied.

In this connection the case of *United States v. Trust No. B. 35*, 107 F. (2d) 22, (C. C. A. 9th)[2] is cited in the petition. In the Trust No. B. 1 case, as here, the peculiar facts were considered and the law applied.

In this connection the case of *Helvering v. Combs, 296 U. S. 365*, is cited in the petition. In the *Combs* case this Court considered the facts in detail, applied thereto the principles of law fixed in the case of *Morrissey v.*

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1. In the *Highlands* case, the Court among other things said:

> "In the Morrissey case the Court analyzed with great care the historical background of the various acts and regulations promulgated by the Treasury Department in the construction of the same, reviewed previous decisions, and established the general principles to be followed in the determination of whether, under a given state of facts, a trust is to be treated as a 'pure trust' or as an 'association' within the meaning of the act.
>
> "We need only say that a study of the facts in the instant case convinces us that they fall within the definition of an association as we gather it from those cases."

2. In this case in holding that there was an association

Commissioner, supra, and held that there was an association taxable as a corporation.

It is insisted that the conclusion of the Board of Tax Appeals in this case that respondent was not subject to income tax as a corporation is clearly correct and that no useful purpose may be served by granting the petition for certiorari. In this case there is a lack of practically all of the formalities and advantages of corporations and the attributes common to corporations are practically all lacking so that it cannot be said in any sense of the word that the attributes here involved have any reasonable resemblance or analogy to those of corporations. Whether the association issue in its final analysis be considered a question of fact or of law, it is insisted that each case must be decided upon its own peculiar facts and that if this respondent is to be held to be an association, then the rule will necessarily be so extended that each partnership and each joint venture and each joint ownership of property will constitute a group of persons subject to income tax as an association.

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taxable as a corporation, the Circuit Court said among other things:

"We hold that the trustee here was not administering a so-called 'traditional type of trust,' but a 'business trust' within Morrissey v. Commissioner, supra, conceived and intended to be conducted as a productive business enterprise for profit, and that it was in fact so conducted."

It is insisted that it was not the purpose of Congress to extend the burdens of corporation taxes to any taxable entities except corporations themselves and to regularly organized groups of individuals who, without a charter, conducted a regular business in the manner and form ordinarily used by corporations. *If the petitioner is desirous of extending this rule further, it is insisted that application should be made to the Congress to enact appropriate legislation in this connection.*

On page 18 of petition, the following statement is made as one of the reasons for granting the writ:

> "This case involves an issue of considerable importance in the administration of the income tax statutes. The question presented is a frequently recurring one, since the method of operation adopted by the parties interested in this lease is used extensively throughout the oil producing sections of the country. Many cases are pending before the Bureau of Internal Revenue, the Board of Tax Appeals, and the courts involving the same question with respect to similar joint undertakings. It is important, therefore, that this Court settle the application of established principles to this type of case."

It is agreed that the issue involved is one of considerable importance in the administration of the income tax statutes. The importance of the issue is clearly shown from the large number of cases litigated on this question. It is also admitted that the question is a frequently recurring one, but it is denied that the *method of operation* adopted by the parties interested in this lease is

used extensively throughout the oil producing sections of the country. This is said because it is difficult to find any number of cases involving this question with identical facts.

The question of depreciation is a frequently recurring one, but under our judicial system it is absolutely impossible for any court to lay down rules which will settle the many depreciation questions which have arisen and which, no doubt, will continue to arise in connection with the administration of the income tax laws.

It is denied that there are many cases pending before the Bureau of Internal Revenue, the Board of Tax Appeals and the Courts involving the same question with respect to *similar joint undertakings*. Two individuals and a corporation have simply sold interests in an oil and gas lease to each of several people under separate contract with each and have taken back from each a separate power of attorney making the sellers agents of each purchaser in the development and operator of the lease.

There are many cases involving the association question in connection with the operation of jointly owned oil properties, but the statement that there are many *similar joint undertakings* is challenged.

The principles govering the determination of the association issue in connection with the administration of income tax statutes have, it is urged, been clearly fixed by this Court, but, after all, the facts must be ascertained before the principles of law can be applied. Here

the facts are not considered to be in disupte and clearly in the *Morrissey* case, it is stated that the decision of the question is a matter of analogy—the determination of the issue as to whether or not the attributes present in a given case are sufficiently analogous to those of a corporation to justify the imposition of tax as a corporation.

CONCLUSION

Wherefore, it is respectfully submitted that the petition should be denied.

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Dallas, Texas,
July, 1940.